WILLIAM HEINEMANN LTD. & DONALD MOORE LTD. v. G. N. CHRISTIE

[C. A. (Thomson C.J., Hill and Good JJ.A.) January 7, 1960]

[K. L. — F.M. Civil Appeal No. 17 of 1959]

Practice and Procedure — Service of writ within jurisdiction in action relating to business or work against defendants resident outside jurisdiction — Agent or manager in the Federation — Applicability of R.S.C. 1957, O.9 r.8A — Appeal from interlocutory order — Whether leave of Court necessary for further evidence to be given — O.58 r.4(2) and (3).

Both the appellants in this case are limited liability companies registered outside the jurisdiction of the Court — Messrs. Heinemann being registered in the United Kingdom and Messrs. Moore in Singapore. Messrs. Moore have, however, established a place of business within jurisdiction and delivered to the Registrar of Companies the name and address of a person in Kuala Lumpur authorised to accept service of process on their behalf in accordance with section 301(1)(c) of the Companies Ordinance. The respondent issued a writ and served it on Messrs. Moore's local agent for Messrs. Heinemann and Messrs. Moore. (This case does not concern the merits of the respondent's claim for damages for libel). Both the appellants, having entered conditional appearances, took out a summons in chambers for an order that the writ be set aside or alternatively that the service of the writ be set aside on the grounds that although Messrs. Heinemann were outside jurisdiction leave to issue and serve the writ was not obtained under O. 2 r. 4 and alternatively that Messrs. Moore could not be served as agents of Messrs. Heinemann. This summons was supported by an affidavit filed by the Managing Director of Messrs. Moore and the respondent filed an affidavit in reply. The affidavit of the Managing Director, Mr. Donald Moore, stated that his company had no control or management of any business or work for Messrs. Heinemann. On the other hand the respondent in his affidavit stated that in effect Messrs. Moore were the official agents of Messrs. Heinemann trading within the Federation. However, the respondent did not indicate the source of his belief as to the relations between the appellants. He merely exhibited to his affidavit certain trade catalogues issued by the appellants. Neal J. dismissed the application but gave leave to appeal.

It was argued for Messrs. Heinemann that they could not be served within jurisdiction because they have no place of business within jurisdiction and Messrs. Moore could not be served within jurisdiction as their agents under O. 9 r. 8A because the action did not relate to any business or work at all or at any rate to any business or work of theirs within the Federation under the control or management for them of Messrs. Moore. The service on Messrs. Moore was therefore so far as Messrs. Heinemann were concerned a nullity. For Messrs. Moore it was argued that although the service on their local agent might be good service, the issue of the writ was nullity by reason of Messrs. Heinemann's residence outside jurisdiction and the respondent's failure to obtain the necessary leave to issue.

Counsel for Messrs. Heinemann also applied for leave to put in evidence a number of further affidavits. He contended that by reason of O. 58 r. 4(2) such further evidence might be given without leave because it related to an interlocutory application but if leave was necessary by reason of O. 58 r. 4(3) then it should be granted.

Held: (1) this was not a case of an interlocutory application but an appeal from an interlocutory order of the Court below, and hence leave was necessary in order to put in the further affidavits as evidence. Such leave could not be granted in this case because the affidavits contained nothing which was not well-known to the appellant from the very beginning of the litigation;

(2) in order to bring a case within O. 9 r. 8A the relationship between a defendant and the person having management or control of his work or business as manager or agent should, at the very least, be such that the manager or agent is under some obligation to bring service of a writ to the notice of his employer or principal. On the evidence before the Court (as contained in the two affidavits) the learned trial Judge was not justified in holding that Messrs. Moore were the agents of Messrs. Heinemann and in rejecting Mr. Moore's affidavit that his company had no control or management of any business or work for Messrs. Heinemann in the Federation. The purported service of the writ on Messrs. Heinemann should therefore be set aside as it did not fall within the provisions of O. 9 r. 8A;

(3) as far as Messrs. Moore were concerned the writ against them was properly served. There was no authority for saying that because Messrs. Heinemann were out of jurisdiction and could not be served within jurisdiction the writ as against Messrs. Moore was a nullity.

Appeal allowed in part.

Cases referred to:

(1) *Russell* v. *Cambefort* 23 Q.B.D. 526, 528.

(2) *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715, 718.

(3) *Dunlop Pneumatic Tyre Co. Ltd.* v. *Actien-Gesellschaft fur Motor and Motorfahrzeugbau vorm. Cudell & Co.* [1902] 1 K.B. 342, 347.

(4) *Saccharin Corporation Ltd.* v. *Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2 K.B. 516.

COURT OF APPEAL.

J. E. Lloyd for the 1st appellant.

Lee Saik Kee for the 2nd appellant.

H. L. Wrigglesworth for the respondent.

Cur. Adv. Vult.

Thomson C.J. (**Hill** and **Good JJ.A.** concurring): In order to appreciate the questions involved in this appeal it is necessary to set out the course of the litigation among the parties to date.

On 29th January, 1959, one G. Naughten Christie, who is the respondent to the appeal, issued a writ against (1) J. B. Wilson, (2) William Heinemann Limited, and (3) Donald Moore Limited. William Heinemann Limited (to whom I shall refer as Messrs. Heinemann) and Donald Moore Limited (to whom I shall refer as Messrs. Moore) are the present appellants. Originally their names were wrongly stated in the writ but that has been put right and we are not concerned with the point here.

The respondent's claim as endorsed on the writ is for damages for libel contained in a book entitled "The Enemy in the Blanket" said to be written by Wilson and published by Messrs. Heinemann and Messrs. Moore. No pleadings have as yet been delivered but while I hope it is unnecessary for me to disclaim any intention to say a single word expressing any opinion as to the merits of the matter it must be assumed for the purposes of this appeal that Wilson did write a libel on the respondent and that this libel was published within the jurisdiction of this Court by Messrs. Heinemann and Messrs. Moore.

We are not concerned here with the position of Wilson although perhaps in the interests of clarity it should be mentioned that he is out of

the jurisdiction of the Court, that leave to issue a writ against him was obtained, that a concurrent writ was issued against him and notice of it was served on him accordingly.

As regards Messrs. Heinemann and Messrs. Moore the position is that both these parties are limited liability companies registered without the jurisdiction of this Court, Messrs. Heinemann being registered in the United Kingdom and Messrs. Moore in Singapore. Messrs. Moore, however, have established a place of business within the jurisdiction of the Court and delivered to the Registrar of Companies the name and address of a person in Kuala Lumpur authorised to accept service of process on their behalf in accordance with section 301(1)(c) of the Companies Ordinance. I shall refer to this person as Messrs. Moore's local agent.

As regards both Messrs. Heinemann and Messrs. Moore leave to issue the writ was not obtained under Order 2 rule 4 and indeed it is difficult to see any reason why leave should have been asked for because so far as these parties were concerned there was no intention of serving the writ out of the jurisdiction. Be that as it may the writ was issued and it was served on Messrs. Moore's local agent for Messrs. Heinemann and for Messrs. Moore.

Both these parties entered conditional appearances and on 6th April, 1959, they took out a summons in chambers for an order that the writ be set aside or alternatively that the service of the writ be set aside on the grounds that although Messrs. Heinemann were not within the jurisdiction leave to issue and serve the writ was not obtained and alternatively that Messrs. Moore could not be served as agents of Messrs. Heinemann. This summons was supported by an affidavit by a Mr. Moore, the Managing Director of Messrs. Moore, which I shall deal with later, and on 2nd May, 1959, the plaintiff Christie filed an affidavit in reply.

The summons came on for hearing before Neal J., in chambers on 7th May, 1959, when counsel for Messrs. Heinemann and Messrs. Moore applied for an adjournment to enable him to get instructions and an adjournment was granted until 16th May. When the matter came on again counsel for Messrs. Heinemann and Messrs. Moore applied for a further adjournment but this was refused. The hearing of the summons then proceeded and in the event Neal J., dismissed the application. Later he gave a certificate that he required no further argument in the matter and gave leave to appeal.

The appeal has accordingly come before this Court.

Before us the two appellants were separately represented for the first time. I do not think it is an unfair summary of their cases as set out in their memorandum of appeal (which is a joint one) and as argued before us by counsel to say that the case for Messrs. Heinemann was that they were resident outside the jurisdiction of the Court and could only be served with notice of a writ in respect of the issue of which leave had been obtained under Order 2 rule 4. They could not be served within the jurisdiction because they have no place of business within the jurisdiction and Messrs. Moore could not be served within the jurisdiction as their agents by reason of Order 9 rule 8A because the action did not relate to any business or work at all or at any rate to any business or work of theirs within the Federation under the control or management for them of Messrs. Moore. The service on Messrs. Moore was therefore so far as they were concerned a nullity and moreover, though this was not strictly necessary to their case, the issue of the writ without leave was in the circumstances itself a nullity. The case for Messrs. Moore was that although the service on their local agent might in itself be good service the issue of the writ was a nullity by reason of Messrs. Heinemann's residence without the jurisdiction and failure to obtain leave to issue.

Both parties made something of the refusal to grant a second adjournment of the summons in chambers when it was asked for but regarding this I would only say that in my opinion that is a matter in which we would be wrong to interfere with the exercise of his discretion by the trial Judge. After all, the parties had had one adjournment and it would require very strong grounds indeed, which I do not see in the case, to convince me that the refusal of a second adjournment has produced any miscarriage of justice.

The evidence before the trial Judge consisted only of the affidavit by Mr. Moore and the affidavit by the plaintiff which have been mentioned. I shall be discussing these shortly but I think I should say here that when the appeal came on before us counsel for Messrs. Heinemann applied for leave to put in evidence a number of further affidavits by Mr. Moore, by the solicitors for Messrs. Heinemann and Messrs. Moore and by the Managing Director of Messrs. Heinemann. It was contended that by reason of Order 58 rule 4(2) such further evidence might be given without leave because it related to an interlocutory application but that if leave was necessary by reason of Order 58 rule 4(3) then leave should be granted. After hearing argument we decided that what we were concerned with was not an interlocutory application but an appeal from an interlocutory order of the Court below which is a very different thing and accordingly leave was necessary. We proceeded to refuse leave on the ground that the affidavits, which amounted in effect to a series of replies to the plaintiff's affidavit, contained nothing which was not well-known to the appellant from the very beginning of the litigation.

"A foreign corporation, which carries on business in this country, has a legal existence here" (*per* Cotton L.J. in *Russell* v. *Cambefort*[1]) and the answer to the question of whether a foreign corporation can be served

with a writ within the jurisdiction was answered by Lord Wrenbury in the case of *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag* [2] when he said:—

"The answer to that question depends on whether the defendants can be found 'here' for the purpose of being served."

The question whether the defendant can be found 'here' had already been answered by Collins M.R., in the case of *Dunlop Pneumatic Tyre Co., Ltd.* v. *Actien-Gesellschaft fur Motor and Motorfahrzeugbau vorm. Cudell & Co.*[3] when he said:—

"the true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country."

Various tests have been suggested as to when a corporation is thus carrying on business. In the case of *Saccharin Corporation, Ltd.* v. *Chemische Fabrik von Heyden Aktiengesellschaft*[4] it was held that one test was whether the defendants' agent within the jurisdiction had power to enter into contracts on their behalf. Again it was said by Lord Wrenbury in the case of *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag, supra* (at p. 721) that the test was whether the defendants were doing business within the jurisdiction by a person and not through him.

With respect, I think these propositions are just as applicable here as they are in England. In England, however, since 1920 it has been possible to effect service on a foreign corporation in cases which do not fall within their ambit by reason of the provisions of R.S.C. Order 9 rule 8A, regarding which I would only observe that its wording would seem to have been suggested by certain observations of Lord Wrenbury in the *Okura* case *(Supra)*. There is no exactly similar provision here. But here the position has always been affected by our Order 9 rule 8A which, although it was only enacted in its present form in 1958, is in effect the same as section 74 of the former Civil Procedure Code which in its turn was taken from section 76 of the Indian Codes of 1877 and 1882 (now Indian Order 5 rule 13).

The relevant portions of the rule read as follows:—

"In an action relating to any business or work against a person who does not reside within the Federation, ... service of a writ of summons for service within the jurisdiction on any manager or agent, having at the time of service personally the control or management of such business or work for such person within the Federation, shall be deemed sufficient service . . . .".

The only observation of a general nature I would make regarding that rule is that like all provisions relating to constructive service it has to be read in the light of the general principle that a defendant must be informed that proceedings have been commenced against him. Such provisions are intended to ensure that when information cannot be conveyed to the defendant directly such steps are taken as experience shows will probably have the effect of bringing the information to his notice. Read in that light it would seem necessary to bring a case within Order 9 rule 8A that at the very least the relationship between a defendant and the person having management or control of his work or business as manager or agent should be such that the manager or agent should be under some obligation to bring service of a writ to the notice of his employer or principal.

In the present case, there is no question of Messrs. Heinemann having been resident within the jurisdiction at any material time so as to be capable of being served. The question, therefore, to be decided is whether at the time of service of the writ on Messrs. Moore's local agent Messrs. Heinemann came within the scope of Order 9 rule 8A. That in its turn reduces itself to the questions of whether the action related to any business or work carried on within the jurisdiction by Messrs. Heinemann and whether Messrs. Moore were managers or agents having personally the control or management of such business or work.

These questions are questions of fact and Neal J., decided them in a sense unfavourable to Messrs. Heinemann. As, however, the evidence before him consisted only of affidavits it is well settled that this Court has a free hand to consider and will, where necessary, revise the conclusions at which he arrived.

On the one hand there was the affidavit of Mr. Moore who stated that his company had no control or management of any business or work for Messrs. Heinemann and went on to state "my Company purchase books from William Heinemann Limited and on these purchases my Company is paid commission by William Heinemann Limited."

On the other hand there was the affidavit of the plaintiff. He exhibited to it certain trade catalogues issued by Messrs. Heinemann and Messrs. Moore respectively to which I shall return. He stated that "I am advised and verily believe that" Messrs. Moore carried on all the work of selling Messrs. Heinemann's publications within the Federation of Malaya: that Messrs. Moore did not merely buy such publications from Messrs. Heinemann and thereafter sell them at a profit on their own account but in fact entered freely into contracts on behalf of Messrs. Heinemann for the supply of publications by Messrs. Heinemann and were remunerated for such work by the payment of commission. "Upon a reasonable view of the relations" between Messrs. Heinemann and Messrs. Moore he "respectfully maintained" that Messrs. Heinemann had in effect and in substance been trading within the Federation by their official agent, Messrs. Moore, who had been remunerated on a commission basis for the contracts which they had made on behalf of Messrs. Heinemann. And "I respectfully maintain that, as regards the business of the Second Defendant within the Federation of Malaya, the Third Defendant may fairly and reasonably be considered as the 'Alter Ego' of the Second Defendant".

I pause here to observe that nowhere in his affidavit did the plaintiff indicate the source of his belief in his very comprehensive and detailed statement of the relations between Messrs. Moore and Messrs. Heinemann nor did he give any concrete instance of any contract made by Messrs. Moore on Messrs. Heinemann's behalf. One explanation of this might be that his statements are nothing but an elaborate piece of guessing where the wish has supplied the place of thought. Another, and more charitable, explanation, however, is that his statements amounted to a series of inferences from the contents of the trade catalogues which have been mentioned and which I shall proceed to examine in detail.

The catalogue of Messrs. Heinemann bears on the front page an address in England. Then comes a list of a very large number of books including a number by well-known authors of world-wide reputation and also including the book of which complaint is made in the present proceedings. The heading of the last page is "OVERSEA OFFICES, REPRESENTATIVES AND AGENTS", and this is followed by the names of a number of firms in various parts of the world including, in respect of South East Asia, Messrs. Moore.

The catalogue of Messrs. Moore bears on the front page the name and Singapore address of the firm which is described as "Publishers and Publishers' Representatives". After some matter which is not relevant there comes the statement that Donald Moore Limited represent the following publishers, the publishers mentioned being about one hundred publishing firms in Great Britain and America including Messrs. Heinemann.

Then comes a portion headed "Terms of Business" from which it would appear that accounts for books supplied, whether published in London or by Messrs. Moore, are payable to Messrs. Moore, but that the discounts to be allowed in respect of different classes of books vary according as to whether they are published in England or published by Messrs. Moore.

Then comes a list of books which is divided into five parts. Parts 1 and 3 which contain about a hundred names are described as books published or to be published for Messrs. Moore. Parts 2 and 4 contain some thirty-seven books said to be published or about to be published by Messrs. Moore for a firm called Eastern Universities Press. Part 5 is headed "A List of books published by publishers represented by Donald Moore, in association with Donald Moore" which contains the names of some two hundred and twenty books published by some twenty-four publishers, only seven of which books are stated to be published by Messrs. Heinemann, one of them being the book "The Enemy in the Blanket". Parts 6 and 8 are of no importance but Part 7 is expressed to be "A list of books for which Donald Moore is the sole distributor in Singapore and Malaya" and it may be of significance that this Part does not contain a single book published by Messrs. Heinemann.

The learned trial Judge dealt with the matter by disregarding the plaintiff's affidavit on the ground that a number of the details set out in it were matters of opinion, the truth clearly being that apart from Mr. Moore's affidavit and the trade catalogues the plaintiff had no knowledge whatsoever of the nature of the relationship between Messrs. Heinemann and Messrs. Moore. On the other hand the Judge took the view that Mr. Moore was "a person not worthy of credence in these Courts" and concluded that his affidavit had been made with reckless disregard to circumstances which should have been within his own knowledge or had deliberately misstated the position. He took this view because he considered there was a fundamental contradiction between what was said in the affidavit and the contents of Messrs. Moore's catalogue. He took the view that the catalogue contained a statement that the book "The Enemy in the Blanket" was published jointly by Messrs. Heinemann and Messrs. Moore and he said there could be no doubt that according to the two catalogues Messrs. Moore were the agents of Messrs. Heinemann.

With great respect I am unable to agree with the learned Judge's conclusions.

Both parties may have been a little reluctant to give the Court as much assistance as they might have given. Mr. Moore in his affidavit might have supplied more details as to the relationship between his firm and Messrs. Heinemann. The plaintiff, on the other hand, might have taken steps, which he did not take, to examine Mr. Moore on his affidavit. Nevertheless the trial Judge had to make the best of the material which he had before him and on that material I think he went too far in rejecting Mr. Moore's categorical statement "my Company has in any case no control or management of any business or work for William Heinemann Limited, in the Federation of Malaya".

The catalogues of which so much has been made are clearly issued for the information of retail booksellers, and are not documents to be construed with the same particularity as a statute or a conveyance. The person to whom they are addressed are not interested in the exact nature of the relationship between Messrs. Moore and the numerous other publishers in whose books they deal. What they are interested in is to know where they can get the books and on what terms they can get them. Messrs. Heinemann give a list of what they call their "OVERSEAS OFFICES, REPRESENTATIVES AND AGENTS" throughout the world and say in effect if a person wants books published by them he can get them from any of these persons. Messrs. Moore say in effect that a large number of boeks published by Messrs. Heinemann and numerous other publishers can be obtained from them on certain terms and make it clear that when such books are obtained from them payment must be made to them.

It is true that in Messrs. Moore's catalogue the book "The Enemy in the Blanket" is included in what is called "A List of books published by publishers represented by Donald Moore, in association with Donald Moore" and in itself there is an ambiguity here which might well have been cleared up had the plaintiff taken the trouble to cross-examine Mr. Moore on his affidavit. But in all the circumstances I can find no justification for refusing to accept the statement in Mr. Moore's affidavit that his Company are indeed the local representatives of Messrs. Heinemann but that they have no control or management of any business or work for Messrs. Heinemann and that they purchase books from Messrs. Heinemann. To my mind there is no inconsistency here.

The catalogue says in effect that Messrs. Moore are carrying on the business (in addition to much other business) of selling Messrs. Heinemann's books and that when they sell them payment is to be made to them and not to Messrs. Heinemann. The affidavit says that such books are purchased by Messrs. Moore from Messrs. Heinemann. In other words a proportion of the books sold by Messrs. Moore are books published by Messrs. Heinemann but in which the property has passed to Messrs. Moore. There is nothing here to belie in any way the statement that Messrs. Moore have no control or management of any business or work for Messrs. Heinemann. Indeed it amounts to no more than saying that Messrs. Moore have the control and management of their own business which consists in part in selling books published by Messrs. Heinemann.

There may be some particular arrangement between Messrs. Moore and Messrs. Heinemann of which we know nothing and as to which the plaintiff has been unable to expiscate any information. That, however, is purely a matter of speculation and the case is to be decided on the material before the Court. On that material there were no grounds for refusing to accept the categorical statement in Mr. Moore's affidavit that his Company had no control or management of any business or work for Messrs. Heinemann in the Federation of Malaya. In the circumstances the purported service of the writ on Messrs. Heinemann should have been set aside and I would allow the appeal to that extent.

With regard to Messrs. Moore I can see little substance in their appeal. The writ against them was properly served on them and I can find no authority for saying that because Messrs. Heinemann are out of the jurisdiction and as it would now appear cannot be served the writ as against Messrs. Moore is a nullity. Order 2 rule 4 only requires leave for issue of a writ when it is to be served or notice of it is to be given out of the jurisdiction and as far as Messrs. Moore are concerned the writ was to be and was in fact served within the jurisdiction.

With regard to the question of costs, difficulty arises by reason of the fact that until a comparatively late stage in the proceedings Messrs. Moore and Messrs. Heinemann were jointly represented. In my view the proper order to be made is that each party should pay his own costs in the Court below and that as regards the appeal the plaintiff should pay Messrs. Heinemann's taxed costs and Messrs. Moore should pay half the taxed costs of the plaintiff.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Pillai, Lim, Lee & Hwang; H. L. Wrigglesworth.*

NG KHOON KHOON v. THE IPOH TOWN COUNCIL & ORS.

[O. C. J. (Smith J.) January 6, 1960]
[Ipoh — Originating Motion No. 13 of 1959]

Local Authority — Practice and Procedure — Prohibition — Application for Order — Laches — Whether right to writ may be lost — Town Boards Enactment (Cap. 137) — Bye-Laws (Part VIII).

The applicant who was the owner of a private dwelling house on land adjacent to that on which an inn was being erected applied for an Order of Prohibition to restrain the respondents from hearing or determining any application for a licence in respect of certain premises in the Town of Ipoh under Regulation 11 of Part VIII of the bye-laws under the Town Boards Enactment (Cap. 137) or from exempting the said premises from the requirements of a licence under Regulation 13 thereof. It was argued on behalf of the owner that (1) as prohibition will not be granted unless there is a material question involved, the erection of a place of public entertainment was not a material question; (2) the writ of prohibition is a writ of right and not a writ of course and as such may be lost by laches. The applicant had between February and December 1959 stood idly by and "watching the building go up." This constituted laches.

Held: (1) the erection of a place of public entertainment is a material question for an adjoining owner who had previously been under the impression that all commercial enterprises were forbidden in that area;

(2) on evidence there has been no laches to disentitle the applicant from the remedy he seeks.

Per curiam: "If I have exercised my discretion in this matter improperly, I still consider that this is such a matter of public importance that it is a case in which the Court should exercise its discretion because, if what the applicant alleges to be the law is in fact the law then the Ipoh Town Council is acting in a way which the law does not permit." See *Regina* v. *Brighton Borough Justices, Ex parte Jarvis*.[2]

Cases referred to:—

(1) *Parochial Church Council of St. Magnus etc.* v. *Chancellor of London Diocese* [1923] P. 45.

(2) *Regina* v. *Brighton Borough Justices, Ex parte Jarvis* [1954] 1 W.L.R. 203, 200.

APPLICATION for order of PROHIBITION.

B. K. Das (*N. Sharma* with him) for the applicant.

J. M. M. Lewis for the respondents.

F. Arulanandom for Madam Sim.

Smith J.: This is a motion by the applicant citing the Ipoh Town Council and its Chairman for an order of prohibition in the following terms:

"An order prohibiting the Ipoh Town Council, and any committee thereof and the Chairman of the Ipoh Town Council, and each of them from hearing or determining any application for a licence by any person in respect of the premises on Lots Nos: 37014 and 37015 in the Town of Ipoh under Regulation 11 of Part VIII